

FOREST SERVICE
U.S. DEPARTMENT OF AGRICULTURE
(PAUL EDWARDS)

IBLA 97-457

Decided May 29, 1998

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, approving a Native allotment application and waiving a 160-rod shoreline limitation on such grants. A-060985.

Allotment approval affirmed; waiver determination set aside and remanded.

1. Alaska: Native Allotments--Evidence: Preponderance

Qualifying substantial actual possession and use of land prior to its inclusion in a national forest was established by a preponderance of recorded evidence which included a Native allotment application corroborated by other proof of use and occupancy beginning in August 1900.

2. Alaska: Native Allotments--Alaska: Shore Space Reserves and Restrictions

A waiver of the 160-rod limitation on Native allotments imposed by 43 C.F.R. § 2094.2(b) not supported by a finding concerning whether public interests would be injured thereby is incomplete and requires further study on remand.

APPEARANCES: Maria Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service; David Voluck, Esq., Sitka Tribe of Alaska, Sitka, Alaska, for Paul Edwards, Heir of Johnny John; Regina L. Slater, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Forest Service, U.S. Department of Agriculture, has appealed from a May 20, 1997, Decision of the Alaska State Office, Bureau of Land

Management (BLM), approving Native allotment application A-060985. The application was filed by Johnny John with the Bureau of Indian Affairs on May 11, 1960, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), for approximately 160 acres of unsurveyed land in secs. 10 and 15, T. 54 S., R. 63 E., Copper River Meridian, on the Lisianski Peninsula of Baranof Island, north of Sitka on Nakwasina Sound.

The application states that John initiated use and occupancy of the land in August 1900 for fishing and hunting, and built two cabins at the site. It recites that this use continued without interruption until October 1959, and that John used the land for hunting and fishing each year from August until October. Johnny John was born on August 1, 1888, and died December 8, 1977. On February 16, 1909, the land covered by his application was reserved for the Tongass National Forest.

On July 22, 1966, BLM rejected John's application, finding that because he used the land as a minor child in the company of his parents he failed to qualify for allotment under Departmental regulations. See 43 C.F.R. § 2561.2, 2561.0-5(a). On August 8, 1979, however, the application was reinstated to determine whether he used the land independently of his parents. The reinstated application was required to be adjudicated on its merits, because the land claimed was reserved for national forest use before December 13, 1968. See Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(4) (1994).

A May 7, 1984, field examination found the resources needed to support John's claimed uses were present on the site claimed. The field examiner found the tract's shore length exceeded the 160-rod limitation but concluded that "the shore space is not needed for harborage and wharfage."

The examiner also found that an adjacent boundary of another Native allotment conflicted with the John application.

On November 13, 1992, BLM requested the submission of additional evidence of use and occupancy; on December 17, 1992, and November 7, 1994, BLM notified the Central Council of the Tlingit and Haida Indian Tribes that BLM records showed a conflict between a boundary of John's allotment and an adjacent allotment; thereafter, under section 905(b) of ANILCA, 43 U.S.C. § 1634(b) (1994), the allotment boundaries were adjusted to resolve the conflict.

On March 12, 1997, BLM issued another notice requesting production of "witness statements which clearly support Johnny John's occupancy of the land." In response to this request, the Sitka Tribe of Alaska responded as to community knowledge of the John allotment, stating that it was used continuously from before 1909 as a fish camp by John, and the place was called Daa Xeit by the tribe. The tribal Trust Resources Coordinator reported further that:

Both of Mr. John's parents died early in his life, and he utilized DAA XEIT not only for his own personal livelihood, but

was also the provider for his grandparents and his own family. A prolific salmon stream runs by the site of Mr. John's cabin and he had a smokehouse on the land that was larger than his own dwelling. Besides the yearly cycle of fish, Mr. John dug cockles, other shellfish, and hunted deer, brown bear, and seal.

Mr. John's fish camp was well known in the Sitka Indian Village and many people would buy fish from him when their food supply ran short.

(Tribal Response at 3.)

The tribe also furnished affidavits from Mark Jacobs, Jr., aged 73, and Herman Kitka, Sr., aged 82, both of whom state that John used the land for a fish camp and for hunting and gathering, and had done so since before 1909. Both men were born after 1909, but state that their knowledge of John's camp operation prior to 1909 rests on statements by their parents and grandparents, and reflects the Sitka community's recollection of the activity of one of its members. Paul Edwards, aged 84, Johnny John's nephew and heir, reports that he "personally witnessed" John's "use and occupancy of his fish camp in Nakwasina." Evaluating John's application in light of this additional information, BLM concluded "it is more likely than not that Johnny John used and occupied that land he claimed prior to the withdrawal for the Tongas National Forest." (Decision at 3.)

The Forest Service appealed, objecting that BLM's Decision rests on affidavits by individuals who were not in existence at the time of the forest withdrawal and ignores the fact that no buildings were found on the tract when it was examined in 1984. It is also contended that the boundary conflict with another Native allotment application implies John's use of his fish camp was not exclusive of others, so as to conform to the requirement of 43 C.F.R. § 2561.0-5(a). Finally, the Forest Service objects that BLM improperly granted a waiver of a 160-rod limitation imposed by 43 C.F.R. § 2094.2(b) on such allotments as John's, without first finding that such a grant was not contrary to public interests.

[1] The Forest Service seeks to impose a higher standard of proof on BLM than is required in such cases; the standard of proof required to be applied is, as BLM found, proof by a preponderance of the evidence of record. See, e.g., Pedro Bay Corp., 111 IBLA 271, 273 (1989). That standard was met by the John application in this case. The Forest Service argument that proof of entry prior to 1909 is lacking overlooks the fact that John's application establishes at first hand his date of entry. This direct evidence is supported by other evidence gathered by BLM, and there is nothing to suggest that his use of the Nakwasina camp did not begin in 1900, as he said it did. The Forest Service has not shown error in the Decision here under review and we conclude that John's allotment application was properly approved.

During BLM's field examination, a boundary line conflict was discovered between John's allotment and a neighboring tract. There is no indication there was an actual dispute between the two allotment claimants over

this area, however, and BLM, acting in consultation with representatives of the Sitka Tribe and relatives of the deceased allotment applicants resolved the boundary question to the satisfaction of the parties. This action conforms to the procedure contemplated by ANILCA section 905(b), 43 U.S.C. § 1634(b) (1994), and it does not appear that either allotment was diminished by the establishment of an agreed boundary between them. Nonetheless, the Forest Service argues that this anomaly indicates John lacked the necessary control over his camp to satisfy the requirement that his possession and use of the land be exclusive of others. This argument must be rejected as without foundation.

[2] Native allotments are limited to a shoreline of no more than 160 rods extending along navigable waters, unless it appears that the lands are not needed for harborage, landing, or wharf use, and provided the public interests will not be injured if there is a waiver of the limitation. 43 C.F.R. § 2094.2(b). The 1984 field examiner found the limitation could properly be waived in this case, because "the shore space is not required for harborage and wharfage." The Decision here under review adopted this finding. Nonetheless, the Forest Service now asserts that this finding is incomplete, and that the regulation creating the limitation requires BLM to consider whether conditions observed at the site and the nature of the site itself will allow the waiver in this case.

It is further argued that the field examiner's finding concerning waiver is inconsistent with his observation that there were "bottles, beer cans, trash" on the allotment indicating recreational use of the allotment, and that this condition suggests that there is a need to limit waterfront access as provided by the cited regulation in order to protect other recognized public interests in the vicinity. In furtherance of this argument, the Forest Service points to the fact that the allotment is "in an area of `extreme subsistence and cultural value'" and that Lisa Creek in Nakwasina Sound has been identified by both the Sitka Tribe and the Alaska Department of Fish and Game as one of the highest subsistence use areas in Sitka."

The record on appeal does not indicate that either the field examiner or the BLM decisionmaker considered these circumstances when the shoreline waiver was proposed and approved, and the Decision is silent concerning the effect of waiver upon relevant public interests. The record before us is therefore insufficient to show that BLM took into consideration relevant public recreational and subsistence uses of the shoreline in granting a waiver of the shoreline limitation for the John allotment; as the record is presently constituted, it lacks a necessary finding, required by Departmental regulation 43 C.F.R. § 2094.2, that a waiver of the limitation will not injure relevant public interests.

So much of the BLM Decision as provides for waiver of the 160-rod limitation imposed by 43 C.F.R. § 2094.2(b) must, therefore, be set aside and remanded to permit BLM to consider whether affected public interests can accommodate a longer waterfront grant than 160-rods in this case.

Nonetheless, approval of John's Native allotment application is not affected by this modification of the BLM Decision here under review. Katmailand, Inc., 77 IBLA 347, 360 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the Alaska State Office approving Johnny John's allotment is affirmed, except that the waiver granted to allow conveyance of a shoreline longer than 160 rods is set aside and the case file is remanded to permit further adjudication of the question whether granting such a waiver will harm relevant public interests.

Franklin D. Arness
Administrative Judge

I concur:

James P. Terry
Administrative Judge